IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 367 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NURMAHMAD BANNUMIYA - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
MR NK MAJMUDAR for Appellant(s) : 1, Appointed by Legal Aid Committee
MR. K.T.DAVE, APP for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 23/02/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this appeal filed under Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 31.1.2003 rendered in Special Criminal (NDPS) Case No. 14 of 2000 by the learned Additional Sessions Judge and Presiding Officer, 2nd Fast Track Court, Kheda at Nadiad, by which the appellant (“the accused” for short) has been convicted for commission of the offences punishable under Section 20(b)(ii)of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act, 1985' for short) and sentenced to suffer RI for 10 years and fine of Rs.1 lac, i.d., S.I. for 2 years.

2. Briefly stated, the prosecution case as disclosed from the complaint as well as unfolded during trial, is as under:

   2.1 PW-8, Dipakkumar Bhagwandas Shah, Police Sub-Inspector, Nadiad Town Police Station, when he was on duty on 15.12.1998, at 10:25

hours in the morning, received a secret information on telephone from Ahmedabad to the effect that one Noormahammad Bannumiya Sheikh, Resident of Nadiad, aged about 55 to 60 years, who has worn military colour shirt and green trouser, is carrying Charas with him and is proceeding towards Borsad by Bus which has left Ahmedabad Depot at 10.00 a.m. The said information was recorded in station diary and the same has been informed telephonically to the Vaghela, District Superintendent of Police and Patel, Special Police Officer. Thereafter, instructions were issued to ASI Valjibhai Kalabhai Hadat to arrange for the panchas. Thereafter, ASI Valjibhai arranged two panchas who were informed about the information received by him. They gave their consent to remain as panchas. Thereafter, aforesaid two panchas, complainant, ASI Valjibhai Kalabhai Hadat, Head Constable Maganbhai Chhaganbhai, Head Constable Pankajbhai Becharbhai, Popatbhai Alabhai, Police Constable Keshavbhai Bhikhabhai, Narendrasinh Pravinsinh, Rasikbhai Chhaganbhai, Bhagabhai Hirabhai and Pravinsinh Dolatsinh had drawn police panchnama in police station and thereafter they all settled down around platform no.9 of Old S.T. Stand, Nadiad.

2.2 At that time, S.T.Bus proceeding

from Ahmedabad to Borsad, bearing registration no. GJ-18V-5280 arrived at the S.T.Stand. One short passenger having slim body alighted from the bus. He was wearing military colour bush-shirt having vertical lines and green trouser. He was intercepted, apprehended and inquired. In reply he stated his name as Noormahammad Banumiya Sheikh, aged 60 years, business nothing, resident of Gajipur Wada, near Niyaj Committee, Besides Rasikbhai Hamidbhai, Nadiad. PW9 – B.V.Ramani, PI of Nadiad Town police station informed him that he received information to the effect that he has brought charas from Ahmedabad and therefore, he would like to search him. He then asked him, whether he wanted to be searched in presence of Mamlatdar or Dy. Collector. He has stated that he has no objection if search is being conducted by the PI himself. Thereafter, a search was conducted in presence of the panchas. It was found that he was wearing military colour shirt and on left hand side there was one pocket and he was wearing green trouser. The said trouser was having two pockets. On further search, one rolled handkerchief was found in his pocket with old plastic bag having circular shape. The same was black in colour and was having greenish and white fungus. The said material-mass

was thereafter checked by the panchas and the same has been smelt, some pungent odour was coming out of the same. The said material was Charas, and therefore, it was thought fit to weigh the same and accordingly, the police constable – Keshavbhai Bhalkhabhai has been asked to bring the concerned person with weighing scale. The said person namely Ashokbhai Budhabhai Parmar, was serving in Laxmi Sugar Bhandar, Nr. Sardar Statue and was a resident of Civil Moti Nahir, Near Well of Hariprasad. He brought one electronic Astron Weighing Scale and the said material was weighing 172 grams. The said Noormahammad Banumiya Sheikh was asked to show permit for keeping 172 grams of Charas. However he stated that he does not have any permit. It was also asked in presence of all the persons, that from whom he has brought the said contraband article Charas. He informed that he had brought the said Charas from one Hayatji Sheikh – nearby Mirazan Hotel, Khanpur Chakla, Ahmedabad. The said contraband article – Charas weighing 172 grams was kept inside the handkerchief of his trouser's pocket in an old plastic bag and was further inserted into new plastic bag and the same was packed in white paper and was tied by a thread. The said contraband article – Charas was accordingly seized. The

value of the said contraband article – Charas was assessed to be Rs.7000/-. On further search, two S.T.Tickets bearing Nos.8576508 and 2941288 of Rs.20/- and Rs.4/- respectively also came to be recovered. Currency notes of different denominations totaling to Rs.610/- were permitted to be retained by him. The detailed panchnama in two parts, from 11.00 hrs. to 11.15 hrs. came to be drawn.

2.3 A complaint for the aforesaid incident was filed against the accused for the offences punishabe u/s 20(b), 22 and 23 of the NDPS Act, 1985.

2.4 During the course of the investigation, the name of accused no.2 – Hayatullahkhan @ Hayatji Sardarkhan Pathan was also disclosed about his involvement in the said offence. Therefore, the investigation was started against him. However, he was absconding and not traceable, and as there was sufficient incriminating evidence against the accused, charge sheet was filed against the accused on 18.10.2000 for commission of the offence punishable u/Ss 20(b)(ii), 22, and 23 of the NDPS Act, 1985 in the Court of Special Judge, Kheda at Nadiad, where it was registered as Special NDPS Case No. 14 of 2000.

2.5 Thereafter further investigation was continued against the absconding accused no.2. The accused no.2 appeared before the Dy. S.P. On 20.2.2001. He was arrested and against him supplementary charge sheet was filed for commission of the offence punishable u/Ss 20(b)(ii), 22, 23 and 29 of the NDPS Act, 1985 on 1.6.2001, in the Court of learned Special Judge, Kheda at Nadiad. The said case is registered as Special NDPS Case No. 3 of 2001.

2.6 The learned Additional Sessions Judge and Presiding Officer, 2nd Fast Track Court, Kheda at Nadiad, to whom both the cases were made over for trial, consolidated both the cases and framed charge against both the accused for commission of the offence punishable u/Ss 20(b)(ii), 22, 23 and 29 of the NDPS Act, 1985. The charge was read over and explained to both the accused. The accused persons pleaded not guilty to the charge and claimed to be tried and there upon they were put to trial by the learned Additional Sessions Judge, in Special NDPS Case No. 14/2000 and 3 of 2001.

2.7 To prove the culpability of the accused, the prosecution has examined in all 10 witnesses and relied upon their oral testimonies, the details of which have been

given in para 3 of the impugned judgment and order. They are as under:

PW	Name	Status	Ex.No.
1	Gautambhai Manibhai Patel	Panch witness	14, Page 123
2	Jatinbhai Dhirajlal Thakkar	Panch witness	16, Page 139
3	Ashokbhai Budhabhai Parmar	Witness	17, Page 145
4	Somabhai Dhulabhai	PSO	18, page 149
5	Manubhai Shankarbhai	Witness	19, page 153
6	Melabhai Madhabhai	Witness	20, page 157
7	Purshottambhai Mejabhai	Witness	22, page 165
8	Dipakkumar Bhagwandas Shah	Complainant/ PSI	26, page 179
9	Babulal Veljibhai Ramani	Witness	32, page 207
10	Ashokkumar Krishnadev Varma	IO	41, page 243

2.8 In order to prove the charge levelled against the accused, the prosecution

has also produced 17 documents and relied upon the contents thereof, the details of which have been narrated in paragraph 4 of the impugned judgment and order.

2.9 After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under Section 313 of the Code. In their further statement they denied the case of the prosecution in toto. They have stated that they have been falsely implicated in the case. However, they have neither led any evidence nor examined any witness to support their defence.

2.10 On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court held that it is proved by the prosecution beyond reasonable doubt that when the accused was intercepted and apprehended, he was found in possession of 172 grams of Charas. Therefore, complicity of the accused for commission of the offence has been proved. Therefore, the accused was held guilty for commission of the offence punishable u/s 20(b)(ii) of the NDPS Act, 1985 and accordingly sentenced to suffer

RI for 10 years and fine of Rs. 1 lac i.d. SI for 2 years, giving rise to this appeal by original accused no.1. It may be noted that since, from accused no.2 no contraband article was found, the trial Court acquitted him.

3 Mr. N.K.Majmudar, the learned advocate of the accused, at the outset submitted that he does not challenge the order of conviction on merits. However, he challenges the order of sentence. According to him, the trial Court has imposed maximum sentence of 10 years for commission of the offence punishable under Section 20(b)(ii) of the NDPS Act, 1985. According to him, the offence was committed on 15.12.1998 and the judgment was delivered on 31.3.2003. Therefore, the accused ought to have been sentenced under the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (“Amended NDPS Act, 2001” for short), which has come into force on 2.10.2001, whereby the benefit of the rationalized sentencing structure has been given to the accused. As per the Amended NDPS Act, 2001, the accused ought to have been sentenced for commission of the offence for possessing narcotic drug weighing less than commercial quantity, where the maximum punishment is RI for 10 years. The accused is in jail for more than 6 years

and, therefore, benefit of the rationalized sentencing structure under the Amended NDPS Act, 2001 should be given to the accused and the period of imprisonment undergone by the accused may be treated as substantive sentence. Therefore, he urged that the sentence may be reduced to the aforesaid extent by allowing this appeal qua sentence only.

4. Mr. K.T.Dave, the learned APP for respondent no.1 – State of Gujarat has candidly submitted that, it is true that when the offence was committed, NDPS Act, 1985 was in force whereas when the judgment was delivered, Amended NDPS Act, 2001 was in force. Therefore, under the Amended NDPS Act, 2001, parliament has rationalized the sentencing structure and three separate sentences are prescribed for possessing; (i) Small quantity (ii) Quantity lesser than commercial quantity but greater than small quantity, and (iii) Commercial quantity. In the instant case the accused was found with 172 grams Charas, which is obviously more than small but less than commercial quantity, therefore, sentence may be suitably reduced as may be deemed fit by this Court. He, therefore, urged to pass appropriate orders.

5. This Court has considered the

submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates appearing for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS Cases, this court has examined the entire evidence on record for itself independently of the trial court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

6. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

7. In this connection, it would be appropriate to refer to the observations made by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as under:

“The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith”.

8. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Investigating Agency during the course of search of the accused and seizure of the muddamal, the contraband powder.

9. A perusal of the entire testimonial collections in the form of oral as well as documentary evidence, it is seen that so far as the conviction recorded against the accused is concerned, though it is not challenged, we do not find any infirmities in the order of conviction recorded against the accused. Therefore, this Court deem it expedient to examine the sole contention with regard to granting of benefit of the rationalized sentencing structure advanced by Mr. N.K.Majmudar, learned advocate for the accused.

10. Section-41 of the Amended NDPS Act, 2001 deals with application of the said Act to pending cases. Sub Section-1 of Section-41 of the Amended NDPS Act, 2001 reads as under:-

"Sub Section-1 of Section-41 – Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence;

Provided that nothing in this section shall apply to cases pending in appeal."

11. In the case of **Basheer alias N.P.Basheer vs. State of Kerala, reported in (2004) 3 Supreme Court Cases 609** the interpretation of Section 41 (1) of the Amended NDPS Act, 2001 has come up for consideration before the Supreme Court. In the said case the Supreme Court has observed that by this section, Parliament has declared its intention to apply the amended provisions of the Act to: (a) all cases pending before the court on 2.10.2001; (b) all cases under investigation as on that date; and provides that these

categories of cases shall be disposed of in accordance with the provisions of the NDPS Act, 1985 as amended by the Amended NDPS Act, 2001. In other words, the benefit of the rationalized sentencing structure would be applicable to these categories. The proviso, however, makes an exception and excludes the application of the rationalized sentencing structure to cases pending in appeal. The Court further observed in para-12 of the judgment that all statues must be interpreted as prospective in operation, unless retrospectivity is expressly declared by the statute or to be inferred as the necessary intendment from the language used in the statute. As far as the amendments introduced in the NDPS Act, 1985, by Act 9 of 2001 are concerned, Section-41, in term, says that the amending Act would apply to all cases pending before the court or under investigation on the date of commencement of the amending Act. In other words, it is to be applied retrospectively. If the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1). However, the court found that the amendments (at least the ones rationalising the sentencing structure) are more beneficial to

the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity they ought to be applied to the cases pending before the Court or even to cases pending investigation on the date on which the amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution.

12. So far as the offence registered against the accused is concerned, admittedly the incident had taken place on 15.12.1998, when contraband article Charas was seized from accused no.1 and at that time NDPS Act, 1985 was in force. The judgment was delivered on 31.3.2003 and the Amended NDPS Act, 2001 came into force w.e.f. 2.10.2001. Admittedly under the NDPS Act, 1985, punishment for commission of the offence u/s 20(b)(ii) is not less than 10 years but which may extend to 20 years and shall also liable for fine which shall not be less than Rs.1 lakh whereas under the Amened NDPS Act, 2001, the commission of the offence under section 20(b)(ii) falls in three categories as per the quantity of the contraband article seized:

(i) Small quantity

(ii)More than the small quantity but less than commercial quantity;

(iii) Commercial quantity.

The contraband article Charas recovered from the accused was weighing 172 grams which is admittedly not a commercial quantity but it is also not a small quantity. The quantity seized from the accused is more than small quantity but less than commercial quantity. Therefore, the punishment is to be awarded as per clause (B) (ii) sub Clause (b) of section 20 of the Amended NDPS Act, 2001.

13. The trial court has imposed minimum sentence under section 20(b)(ii) of the NDPS Act, 1985 as it stood before the Amended NDPS Act, 2001, which came into force with effect from 2.10.2001. Therefore, according to us, the punishment imposed by the trial court under the NDPS Act, 1985 does not stand to scrutiny of this court as the trial court has considered the minimum sentence of 10 years for commission of the offence punishable under section 20(b)(ii) of the NDPS Act, 1985, but, in fact, the trial court ought to have imposed sentence under the Amended NDPS Act, 2001 wherein the punishment prescribed is rigorous imprisonment for a term which may extend to 10 years and with fine which may extend to 1 lac rupees by virtue of Clause (B)(ii) sub-Section(b) of section 20, meaning thereby, the Court can impose RI upto 10 years but there is no question of imposing minimum sentence of 10 years in

instance case.

14. In this case, the accused has undergone sentence of more than 6 years and as per the notification - SO 1055 (E) dated 19.10.2001, at srl. no.23, the quantity of 100 gram Charas is a small quantity whereas quantity of 1 kg. Charas is a commercial quantity. It is admitted that from the accused, only 172 gram Charas was recovered, therefore, considering the Amended NDPS Act, 2001, wherein the benefit of rationalized sentencing structure deserves to be given to the accused, according to us, looking to the Amended NDPS Act, 2001 and considering the fact that the accused has already undergone more than 6 years' imprisonment, and only 172 grams of Charas was recovered from him, while maintaining the order of conviction, we are of the opinion that the sentence of RI of 10 years imposed on the accused under the NDPS Act, 1985 is required to be altered under the the Amended NDPS Act, 2001 by imposing sentence of RI of 5 years and fine of Rs.50,000/- i.d. SI for 6 months as the case covered under Clause (B) (ii) of sub-Section (b) of Section 20 of the Amended NDPS Act, 2001.

15. Seen in the above context, the judgment and order recorded u/s 20(b)(ii) of NDPS Act,

1985 against the accused deserves to be confirmed and maintained. However, it is altered as conviction under Section 20(b)(ii) of the Amended NDPS Act, 2001, and, therefore, the sentence imposed on him is required to be reduced in terms of the final order as per this judgment.

16. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed qua sentence only. The impugned judgment and order of conviction convicting the accused for commission of the offence punishable u/s 20(b)(ii) of NDPS Act, 1985 is altered into conviction u/s 20(b)(ii) of the Amended NDPS Act, 2001, and accordingly the accused is sentenced to suffer RI of 5 years and to pay a fine of Rs.50,000/- i.d. SI of 6 months.

17. As per the jail remark sheet, the accused is in jail for more than 6 years. But, as the accused has been sentenced to suffer RI for 5 years and fine of RS.50,000/- i.d. SI of 6 months, the jail authority is directed to set the accused at liberty forthwith, if his presence is not required in connection with any other case.

18. In this manner, this appeal stands disposed of accordingly.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

Jayanti*